

IN THE MATTER OF	:	BEFORE THE
CONVENIENCE RETAILING, LLC	:	HOWARD COUNTY
	:	BOARD OF APPEALS
Petitioner	:	HEARING EXAMINER
	:	BA Case No. 08-049C

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DECISION AND ORDER

On December 15, 2008, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the conditional use petition of Convenience Retailing, LLC, for a gasoline service station in combination with a convenience store and car wash in a PEC (Planned Employment Center) Zoning District, pursuant to Section 131.N.25 of the Howard County Zoning Regulations (the "Zoning Regulations").

The Petitioner certified that notice of the hearing was advertised and that the subject property was posted as required by the Howard County Code. I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

Andrew R. Robinson, Esquire, represented the Petitioner. Sang Oh, Esquire, represented Ed Biegel. Richard Levitan and Peter Stone testified on behalf of the Petitioner. Thomas Garland and Brian Galas testified in support of the petition. Richard Futrovsky, Gerald McIntyre, and Arline Calaby testified in opposition to the petition.

FINDINGS OF FACT

Based upon the preponderance of evidence presented at the hearing, I find the following facts:

1. The subject property is located in the 3rd Election District on the south side of Birmingham Way, approximately 400 feet southeast of Warwick Way. It is referenced on Tax Map 16, Grid 5, as Parcel 429,C-1, and D-1 and is also known as 10825 Birmingham Way (the "Property").

2. The proposed area of the Conditional Use is an irregularly shaped, 0.91-acre site (39,640 square feet) within the Waverly Woods Shopping Center parking lot. It comprises the northeastern corner of Parcel C-1 and a portion of the northwestern corner of the adjoining Parcel D-1 (the "Site"). The Site has frontage on Birmingham Way and on the west side of the shopping center entrance drive.

3. Vicinal properties. Across Birmingham Way to the northeast and east is a POR-zoned (Planned Office Research), multistory, age-restricted adult housing apartment building, beyond which are R-SA-8-zoned, single-family attached dwellings fronting on local streets. To the south and east of the proposed access drive is the shopping center and beyond it, the R-A-15-zoned residential condominiums of the Fairway Courtyards II development.

4. Roads. Birmingham Way has 44 feet of paving within an 80-foot right-of-way. No traffic data is available. The estimated sight distance from the existing Birmingham Way driveway entrance is more than 300 feet to the east and west.

5. The Property is served by public water and sewer.

6. The 2000 General Plan Policies Map 2000-2020 designates the Property as "Residential Areas and Mixed Use Center." The 2000 General Plan Transportation Map 2000-2020 depicts Birmingham Way as a Major Collector.

7. The Petitioner proposes to develop the Site with a gasoline service station conditional use and a convenience store and car wash. The combination of uses is permitted subject to the criteria in Section 131.N.25.i, as discussed below.

8. The gasoline service station use would consist of an approximate 58' by 94' canopy covering the gasoline service station operation situated in the westerly portion of the Site. Three underground fuel tanks would be located on the canopy's south side. The operation would comprise six double-sided fuel pumps, which would allow 12 vehicles to refuel at the same time. Diesel fuel would be dispensed from a single pump island with a dual hose fuel dispenser. The median island adjacent to Birmingham Way would accommodate a vacuum island and air tower. A full masonry enclosed dumpster pad will be situated in the Site's northwest corner.

9. The eastern part of the canopy will connect to a 1,800 square-foot convenience store. A propane exchange program will be located outside the store. A proposed 1,080 square-foot car wash will adjoin the store, with eight stacking spaces wrapping around an open area to the store's south. According to the amended Conditional Use Plan, the total combined area of the uses is about 34,273 square feet (excluding loading areas).

10. The uses would operate from 5:30 a.m. to 12:00 a.m. seven days a week. No more than eight employees will staff the store (full or part-time), with no more than three employees working any shift.

11. Birmingham Way and the existing driveway to the Shopping Center, will provide access to the Site, as will the existing shopping center parking lot lanes. Nine parking spaces (including two disabled spaces) will be located in front of the store, with eight additional spaces adjacent to Birmingham Way.

12. Mr. Levitan testified that the amended petition (as marked up on Petitioner's Exhibit 1, dated December 15, 2008) and Petitioner's Exhibit 4 depicts a low ground brick monumental sign relocated several feet to the south of Birmingham Way. He stated that the flush mounted lighting would be recessed and shielded so that it would not shine beyond the canopy. No yard (pole) lights would be added. In response to questioning, he stated that about 4,651 vehicles a week would purchase gas at the station.

13. Peter Stone testified that the proposed landscaping would consist of an "E" type buffer along Birmingham Way and a "B" type buffer along the rest of the perimeter. Based on the amended plan, the total landscaping area comprises about 21% of the Site. He also stated the convenience store would be about 21 feet in height and the canopy, about 19 feet.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, I conclude as follows:

I. General Criteria for Conditional Uses (Section 131.B)

A. Harmony with the General Plan. Section 131.B.1 requires me to evaluate the proposed conditional use's harmony with the land uses and policies indicated in the Howard County General Plan for the PEC zone. In evaluating a plan under this standard, I must consider (a) the nature and intensity of the use, the size of the site in relation to the use, and the location of the site with respect to streets giving access to the site; and (b) if a conditional use is combined with other conditional uses or permitted uses on a site, whether the overall intensity and scale of uses on the site is appropriate given the adequacy of proposed buffers and setbacks.

In this case, the proposed use is consistent with General Plan Chapter 5, Community Conservation and Enhancement, explains that commercial centers contribute to a high quality of

life for residents and workers by providing them easy access to the goods and services they need in their normal activities. The proposed gasoline service station is harmonious with this policy, as it will provide area residents and workers with services and encourage users to use the shopping center, a benefit the center's long-term economic viability.

The proposed uses on the .91-acre Site meet all setback and use requirements. The existing shopping center driveway, parking lot lanes, and Birmingham Way will provide adequate access. I therefore conclude the size of the Site in relation to the use, and the location of the site with respect to streets giving access to the Site are harmonious with the General Plan's policy of providing needed services to area residents and workers.

Additionally, the combination of uses on the site will occupy about 34,273 square feet of the 39,640 square-foot Site, in compliance with Section 131.N.25.i, as discussed below. Because all proposed uses meet all setback and use requirements, and the Petitioner is proposing a Type "E" buffer along Birmingham Way and a Type "B" buffer along the driveway for a total landscape area of 21percent (which exceeds the 20 percent minimum requirement), I conclude the overall intensity and scale of uses on the site is appropriate given the adequacy of proposed buffers and setbacks.

B. Adverse Impacts. Unlike Section 131.B.1, which concerns the proposed use's harmony or compatibility with the General Plan, compatibility with the neighborhood is measured under Section 131.B.2's four "adverse effect" criteria": (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading, and; (4) access.

When assessing a proposed conditional use under these criteria, we must begin with the realization that virtually every human activity has the potential for adverse impact. Zoning

recognizes this fact and, when concerned with conditional uses, accepts some level of such impact in light of the beneficial purposes the zoning body has determined to be inherent in the use. Thus, the question in the matter before me is not whether the proposed use would have adverse effects in a PEC district. The proper question is whether those inherent adverse effects are greater at the proposed site than they would be generally elsewhere within the PEC district. *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981); *Mossburg v. Montgomery County*, 107 Md. App. 1, 666 A.2d 1253 (1995).

For the reasons stated below, the Petitioner has met its burden of presenting sufficient evidence under Section 131.B.2 of the Zoning Regulations to establish this proposed use will not have adverse effects on vicinal properties beyond those ordinarily associated with a gasoline service station in the PEC district.

a. Physical Conditions. The impact of adverse effects such as noise, dust, fumes, odors, lighting, vibrations, hazards or other physical conditions will be greater at the subject site than it would generally be elsewhere in the zone or applicable other zones.

The testimony and evidence indicate the proposed facility will not generate inordinate noise, significant outdoor lighting, or other physical effects detectable within the neighborhood. The lighting will be flush mounted and shielded and the petition states that the use will not generate noise or other physical effects. Consequently, I conclude the Petitioner has adequately shown that noise, lighting, or other physical conditions generated by the proposed use will not be greater than that which is ordinarily associated with a gasoline service station in the district.

b. Structures and Landscaping. The location, nature and height of structures, walls and fences, and the nature and extent of the landscaping on the site are such that the use will not hinder or discourage the development and use of adjacent land and

structures more at the subject site than it would generally in the zone or applicable other zones.

Based on the evidence, I conclude the Petitioner has met its burden of demonstrating the proposed use complies with Section 131.B.2.b. The record indicates the height of all structures will be less than the maximum permitted. (The convenience store will be 21 feet high.) All landscaping buffers will meet or exceed county standards and there is no material evidence that the inherent operational characteristics of the proposed gasoline service station will discourage the use of adjacent land and structures.

c. Parking and Loading. Parking areas will be of adequate size for the particular use. Parking areas, loading areas, driveways and refuse areas will be properly located and screened from public roads and residential uses to minimize adverse impacts on adjacent properties.

The proposed parking spaces exceed minimum requirements. The Zoning Ordinance requires 8 spaces and 17 are proposed. The medians between parking areas and public roads will be landscaped in accordance with County standards. Because the dumpster will be enclosed by a masonry wall, it will not be visible.

d. Access. The ingress and egress drives will provide safe access with adequate sight distance, based on actual conditions, and with adequate acceleration and deceleration lanes where appropriate.

The use of the existing shopping center driveway will continue to provide safe access with adequate sight distance.

II. Specific Criteria for Gasoline Service Stations (Section 131.N.25)

a. The use will not adversely affect the general welfare or logical development of the neighborhood or area in which the station is proposed and will not have a blighting influence as a result of a proliferation of gasoline service stations within a particular area.

The closest gasoline service station is located on US 40 at Old Frederick Road, about 3.7 miles from the Site. The second nearest station is located about 5.1 miles away in West Friendship. Based on these distances and on the above discussion of adverse impacts, I conclude the proposed conditional use will not adversely affect the area's general welfare or logical development, nor have a blighting influence because of a proliferation of gasoline service stations within a particular area, in accordance with Section 131.N.25.a.

b. The minimum lot size for a gasoline service station is 20,000 square feet. If a gasoline service station is combined with another use on the same lot, the minimum lot size shall be increased in accordance with the provisions of Section 131.N.25.i.

The Conditional Use Site is 0.91 acres (39,640± sq. ft.) in area and the Property itself is 11.81 acres in size. The 34,273 square-foot use area (which excludes loading areas) exceeds the 20,000 square-foot minimum area and as discussed below, the combination of uses meets the minimum required lot size, in accordance with Section 131.N.25.b.

c. The lot shall have at least 120 feet of frontage on a public road. If at the intersection of two public roads, the total of the frontage along both roads may be used if ingress or egress is provided to both roads.

According to the amended Conditional Use Plan, the Site has about 190 feet of frontage on Birmingham Way, in accordance with Section 131.N.25.c.

d. At least 20 percent of the site area shall be landscaped. The landscaping plan shall include plantings which enhance the appearance of the site from public roads and provide appropriate buffering for adjacent uses.

Peter Stone testified that about 21 percent of the Site would be landscaped within the medians, the landscaped island and the perimeter. The proposed use complies with Section 131.N.25.d.

e. Solid walls such as masonry or wood and masonry may be required by the Hearing Authority when the site borders a residential district. When solid walls are required, landscape planting is required on the outside of the wall.

Because none of the bordering properties are residentially zoned, this section does not apply.

f. Refuse areas shall be fenced or screened from view. The plan shall indicate the disposal methods to be used for all waste material generated by vehicle repair operations.

The dumpster will be fully enclosed with a masonry wall, in accordance with Section 131.N.25.f. No vehicle repair operations are proposed.

g. Access driveways and on-site paved areas shall be designed and located to ensure safe and efficient movement of traffic and pedestrians.

The existing driveway, shopping center parking lot lanes, and walkways shown on the Conditional Use Plan will continue to provide safe and efficient movements of traffic and pedestrians, in accordance with Section 131.N.25.g.

h. Operation

(1) Outside operations shall be limited to the dispensing of gasoline, oil, water, pressurized air, the changing of tires and minor servicing. Storage of all automotive supplies shall be within the main structure.

Proposed outside operations include the dispensing of gasoline, oil, and pressurized air, in accordance with Section 131.N.25.h.i.

(2) Vending machines and the sale of propane are permitted as accessory uses, provided these uses are screened or enclosed if required by the Hearing Authority.

The Petitioner proposes a propane exchange program as an accessory use to be located just outside the convenience store. Subject to the condition of approval that the propane use be

screened, the use complies with in accordance with Section 131.N.25.h.2. No vending machines are proposed.

(3) The premises shall be maintained at all times in a clean and orderly condition, including the care or replacement of plant materials required in the landscaping plan. The responsibility for compliance with this provision shall be with all parties having a lease or ownership interest in the gasoline service station.

Subject to the condition of approval that the Petitioner complies with this condition, the proposed use accords with Section 131.N.25.h.3.

(4) Where a gasoline service station is adjacent to a residential district, its hours of operation and a detailed lighting plan shall be approved by the Hearing Authority.

Although this section does not apply because there is no adjacent residential district, the proposed hours of operation are 5:30 a.m. to 12:00 a.m., which is reasonable for the use and the station light will be flush mounted. No new pole lighting is proposed. The proposed use accords with Section 131.N.25.h.4.

i. Other Uses

(1) Other uses may be located on the same lot as a gasoline service station, including uses permitted in the zoning district as well as car washes and convenience stores, provided that all uses are approved by the Hearing Authority and the minimum lot area is increased to accommodate the combination of uses. At a minimum, the minimum lot size of 20,000 square feet must be increased by an area equal to the gross square footage of floor area, parking area and loading or stacking areas required for the additional uses.

The gasoline service station use will be combined with a 1,800 square foot convenience store and a 1,080 square foot car wash. The total area of the proposed uses is 34,273 square feet, including required parking spaces (four each for the station and store under Section 133.d.4.c of the Zoning Regulations) and the eight stacking spaces associated with the car wash (about 3,000

square feet). Since the Site is .091 acres in size, or about 39,640 square feet, and the combination of uses is about 34,273, the proposed combination of uses complies with Section 131.N.25.i.1.

The Petitioner's proposal to dispense diesel fuel is a reasonable use for a gasoline service station located within a Planned Employment Center. Because this use is harmonious with the non-residential component of the Waverly Woods PEC development, I am approving it.

The vacuuming use next to the pressurized air dispenser is a reasonable use for a carwash and consistent with the purposed and intent of these regulations. I am therefore also approving this use.

(2) In the PEC, M-1 and M-2 districts, the gross floor area of convenience stores shall not exceed 3,500 feet.

Because the proposed convenience store will be 1,800 square-feet in area, it complies with Section 131.N.25.i.2.

III. Opposition Testimony

Once a petitioner presents sufficient evidence establishing its proposed use meets the requirements of the statute, it is incumbent upon those opposed to the petition to show the use at the proposed location would cause an adverse effect upon adjoining and surrounding properties unique and different, in kind or degree, than that inherently associated with such a use regardless of its location within the zone. *Mossburg v. Montgomery County*, 107 Md. App. 1, 666 A.2d 1253 (1995).

The persons who testified in opposition to the proposed conditional use have not met their burden of showing the proposed use would have an atypical burden upon adjoining and surrounding properties. The speculative nature of their testimony about increased noise, safety,

and traffic does not sufficiently demonstrate any adverse effects unique or different from those ordinarily associated with a gasoline service station in a PEC zoning district. The County Council has already determined that gasoline service stations are presumptively compatible with PEC-zoned communities. In this case, there is insufficient credible evidence in the record to defeat this presumption.

ORDER

Based upon the foregoing, it is this 8th day of January 2009, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the petition of Convenience Retailing, LLC, for a gasoline service station conditional use, in combination with a convenience store and car wash, in a PEC Zoning District is hereby **GRANTED**;

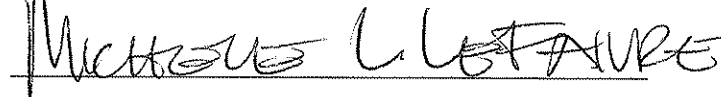
Provided, however, that:

1. The conditional use will apply only to the uses and structures as described in the petition and amended Conditional Use Plan, and not to any other activities, uses, structures, or additions on the Property.
2. Outside operations are limited to dispensing gasoline, diesel fuel, pressurized air, the changing of tires, propane gas exchange, and vacuuming.
3. All outside sales of propane shall be screened.
4. The premises shall be maintained at all times in a clean and orderly condition, including the care or replacement of plant materials required in the landscaping plan. The responsibility for compliance with this provision shall be with all parties having a lease or ownership interest in the gasoline service station.
5. Abandonment. The premises (including landscaping) of the gasoline service station, if not in continuous operation or abandoned shall be maintained in the same manner as is required under these regulations for operating gasoline service stations.

6. Voidance of the Use. The gasoline service station conditional use shall become void upon notice of abandonment by the owner. If notice of abandonment is not received, but it is determined by the Department of Planning and Zoning that the gasoline service station has not been in continuous operation for a period of twelve months, a revocation hearing shall be initiated by the Department of Planning and Zoning in accordance with the procedures set forth in Section 131.L. For purposes of this subsection, "continuous operation" shall mean operation as a gasoline service station at least eight hours per day, five days per week.

7. Removal. If the gasoline service station is abandoned and the conditional use becomes void as provided above, all gasoline pumps, pump island canopies, and other improvements (not including buildings) shall be removed from the site within six months of the date the conditional use becomes void.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**



Michele L. LeFaivre

Date Mailed: 1/12/09

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.